Supreme Court, U.S.
FILED
JUN 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LEE M. THOMAS, Administrator, Environmental Protection Agency, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

OUTBOARD MARINE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD J. PHELAN*
ROSEANN OLIVER
JAN FELDMAN
PHELAN, POPE & JOHN, LTD.
180 North Wacker Drive
Suite 500
Chicago, Illinois 60606
(312) 621-0700

RICHARD J. KISSEL
JEFFREY C. FORT
DANIEL C. O'CONNELL
MARTIN, CRAIG, CHESTER & SONNENSCHEIN
115 South LaSalle Street
Chicago, Illinois 60603
(312) 368-9700

Aitorneys for Respondent
(* *Counsel of Record*)

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

34pp

QUESTION PRESENTED

Whether the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, authorizes the United States Environmental Protection Agency to utilize an ex parte warrant to enter private property to carry out a three and one-half year construction project there for the treatment and storage of sediments removed from adjacent property, when the entry would cause substantial disruptions to the owner's business and expose its employees to potential danger.

PARTIES TO THE PROCEEDING

Outboard Marine Corporation is respondent herein. There is no parent corporation of Outboard Marine Corporation. Outboard Marine Corporation has an ownership interest in Adventurent, Inc. OMC wholly owns its other subsidiaries.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION	2
SUPPLEMENTAL STATEMENT OF CASE	2
REASONS WHY THE WRIT SHOULD BE DENIED	7
1. No Public Purpose Would Be Served By Permitting EPA Access To OMC's Property At This Time	7
2. EPA Has Not Shown That The Lower Court's Decision Is Impeding Any Remedial Actions	10
3. The Seventh Circuit Properly Interpreted The Superfund Statute	11
CONCLUSION	16
APPENDIX A	1a
APPENDIX B	2a
APPENDIX C	3a
APPENDIX D	8a

TABLE OF AUTHORITIES

CASES:	PAGE
City of Bloomington, Indiana v. Westinghouse Electric Corporation, Consolidated Cases IP 83-9-C, Order (S.D. Ind. May 2, 1986)	10
Delaware L. & W. R.R. Co. v. Morristown, 276 U.S. 182 (1928)	13, 14
Outboard Marine Corporation v. Thomas, 610 F. Supp. 1234 (N.D. Ill. 1985)	6
Outboard Marine Corporation v. Thomas, 773 F.2d 883 (7th Cir. 1986)	9, 11, 12, 13
United States v. 67.59 Acres of Land, 415 F. Supp. 544 (M.D. Pa. 1976)	14
United States v. 20.53 Acres of Land, 263 F. Supp. 694 (D. Kan. 1967)	14
United States v. Outboard Marine Corporation, 104 F.R.D. 405 (N.D. Ill. 1984), *aff'd*, No. 85-1584, slip op. (7th Cir. April 22, 1986)	5

STATUTES AND REGULATIONS:	PAGE
10 U.S.C. § 2663 (1982)	14
10 U.S.C. § 2664 (1982)	14
16 U.S.C. § 423k (1982)	14
33 U.S.C. § 591 (1982)	14
Federal Water Pollution Control Act, § 311(c), 33 U.S.C. § 1321(c) (1982)	12
Resource Conservation and Recovery Act of 1976, § 7003, 42 U.S.C. § 6973 (Supp. II, 1984) ...	12

Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*: 2, 12

§ 104(a), 42 U.S.C. § 9604(a) 13

§ 104(b), 42 U.S.C. § 9604(b) 13

§ 104(c)(3), 42 U.S.C. § 9604(c)(3) 11

§ 104(e), 42 U.S.C. § 9604(e) 13

§ 105, 42 U.S.C. § 9605 15

§ 106, 42 U.S.C. § 9606 ..... 9, 10

40 C.F.R. Pt. 300 15

50 Fed. Reg. 47,912 (Nov. 20, 1985) 15

MISCELLANEOUS: PAGE

Environmental Protection Agency Conceptual Design, Document No. 13-5M28.0 W65328.00 (Sept. 14, 1984) 6

Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcomms. On Environmental Pollution And Resource Protection Of The Senate Comm. On Environmental And Public Works, 96th Cong., 1st Sess. (1979) 12, 13

Hazardous and Toxic Waste Disposal Field Hearing: Joint Hearings before The Subcomms. On Environmental Pollution and Resource Protection Of The Senate Comm. On Environmental And Public Works, 96th Cong., 1st Sess (1979) . 14, 15

Nichols on Eminent Domain 3d ed. (1983) 14

No. 85-1735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LEE M. THOMAS, Administrator, Environmental Protection Agency, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

OUTBOARD MARINE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

This matter is pending on the petition of Lee M. Thomas and the United States Environmental Protection Agency ("Petitioners" or "EPA") for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Respondent Outboard Marine Corporation ("OMC") submits this response in opposition to that petition, and respectfully requests that the petition be denied.

INTRODUCTION

At issue in this case is the EPA's authority in non-emergent circumstances to obtain an ex parte warrant under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* ("Superfund" or "CERCLA") for the purpose of beginning a three and one-half year construction project on private, uncontaminated property. The court below found that such authority does not exist. Neither that ruling, nor the circumstances surrounding this case, justify this Court's review.

SUPPLEMENTAL STATEMENT OF CASE

While this case was only commenced in 1985, it grew out of circumstances and litigation stretching back to 1976. Petitioners' brief omits many crucial background facts. The district court denied OMC's motion for preliminary injunction without a hearing and without any discovery. The following facts were submitted by OMC in support of its motion and were not disputed by Petitioners.

OMC is a manufacturer with its principal place of business in Waukegan, Illinois. For nearly fifty years, OMC has manufactured outboard motors, and other products at its facilities near Waukegan Harbor. OMC currently employs over 2,000 manufacturing, service and office personnel at its Waukegan Harbor operations (R.A. 1, ¶ 12; R.A. 6, ¶¶ 1, 11).[1]

[1] References to documents in the record on appeal in the Seventh Circuit are cited herein as "R.A." followed by the number of the document in the clerk's list of documents.

OMC's Waukegan Harbor facilities are the exclusive source of critical parts used in finished products assembled at other OMC plants. Those other plants also rely on the Waukegan Harbor facilities for their data processing, engineering and design services. These critical services are performed in no other OMC facility in the United States or abroad (R.A. 1, ¶¶ 12, 42; R.A. 6, ¶ 23).

As the map accompanying the lower court's decision shows (App. A, *infra*; R.A. 1, Exhibit E; R.A. 6, Exhibit E), the property at issue in this case includes a thirty acre tract of land owned by OMC directly adjacent to Waukegan Harbor (the "Harbor-front property"). On that thirty acres, OMC operates its world-wide computer-based data processing center, its world-wide engineering facility and its world-wide die cast and machinery facility. EPA does not seek to clean up that property, because it has never contended it is contaminated or requires any remedial action. Instead, EPA intends to occupy the Harbor-front property to construct massive treatment lagoons, batch plants, dewatering lagoons and pumping stations. EPA hopes to utilize that property to treat materials dredged out of the adjacent Waukegan Harbor. EPA also intends to construct a fifteen foot high containment cell covering several acres of OMC's parking lot to serve as a permanent storage area for materials removed from Waukegan Harbor (R.A. 1, ¶ 28; R.A. 6, ¶ 9).[2]

OMC does not own Waukegan Harbor, nor has it ever been adjudged liable for any environmental harm or threat relating to Waukegan Harbor. At no time has EPA or any other governmental agency instituted condemnation proceedings to acquire title to any part of OMC's prop-

[2] A map showing EPA's design plans for OMC's Waukegan Harbor facilities is appended hereto (App. B, *infra*; R.A. 1, Exhibit G; R.A. 6, Exhibit F).

erty. No court ruling requires OMC to sacrifice its property to EPA's project (R.A. 1, ¶ 18; R.A. 6, ¶ 3).

The EPA's interest in Waukegan Harbor began ten years ago when it began to claim that there were deposits of polychlorinated biphenyls (PCBs) in the bottom sediments of Waukegan Harbor, and that OMC's die cast operation was the source of those deposits. Two years later, in 1978, EPA sued OMC in the United States District Court for the Northern District of Illinois, *United States v. Outboard Marine Corporation*, No. 78 C 1004 (the "*OMC*" case) charging that PCBs in one slip of Waukegan Harbor and in areas of OMC's property north of the Harbor constituted a threat to the environment (R.A. 1, ¶ 20).

During the over seven years the *OMC* case was pending, the parties compiled an enormous amount of evidence relating to potential health effects from PCBs. After the completion of all those studies and sampling programs, EPA expressly conceded that it had no evidence that PCBs in this area were adversely affecting local residents, fish, drinking water or air.[3] Those admissions were made after PCB deposits had been in Waukegan Harbor for at least thirty years.

Throughout the litigation, OMC sought a trial to resolve the cental issue in the case—whether PCBs in Waukegan Harbor and on certain areas at the north end of OMC's property posed any threat to health or the environment. When the *OMC* case was virtually ready for trial, however, EPA moved to dismiss its case voluntarily.

---

[3] Relevant excerpts from EPA's record admissions are appended hereto (App. C, *infra*), and were filed in the district court as an exhibit to the complaint and motion for preliminary injunction (R.A. 1, Exhibit F; R.A. 6, Exhibit G).

After the *OMC* case was dismissed,[4] and without warning to OMC, EPA obtained an ex parte warrant from a magistrate of the district court. The warrant purported to authorize EPA to enter OMC's property to carry out the first phase of its three and one-half year construction project (R.A. 1, ¶ 2; R.A. 6, ¶¶ 1-2). In that first phase, EPA intended to bring thirty-five workers all privately employed, onto OMC's Harbor-front property to do soil borings, remove earth to locate underground utility lines, and install permanent markers. The warrant would have required OMC to give unrestricted access to EPA's workers for seventy days, during which they would have brought in ten trucks, eight automobiles, several vans, a trailer-mounted steamcleaner, numerous massive drill rigs, a job trailer, a waste hauler, a bulldozer and other unspecified "miscellaneous drilling equipment" (R.A. 1, ¶¶ 45-47; R.A. 6, ¶¶ 15-16).

This work, and EPA's later construction work, would have had a profound effect on OMC's operations and on its 2,000 employees in the area. EPA's "remedy" would completely preclude OMC from using the thirty acres of Harbor-front property for the three and one-half years EPA intends to occupy that land with its open lagoons and pumping systems. EPA's use of that property to dewater sediments from Waukegan Harbor would permanently damage that property. OMC would also be permanently excluded from the six acres of its parking lot where EPA expects to locate its PCB containment cell (R.A. 1, ¶¶ 26- 42, 48; R.A. 6, ¶¶ 21-23).

The excavation and construction EPA intends to perform on OMC's Harbor-front property would produce

[4] *United States v. Outboard Marine Corp.*, 104 F.R.D. 405 (N.D. Ill. 1984), *aff'd*, No. 85-1584, slip op. (7th Cir. April 22, 1986).

ground vibrations and airborn dust that would disrupt and potentially shut down OMC's computer system. Because the Waukegan Harbor facility services all of OMC's facilities in the United States and worldwide, EPA's actions on OMC's property would affect those other facilities as well (*Id.*).

EPA's dredging of Waukegan Harbor and open-air treatment of sediments on OMC's Harbor-front property would release PCBs into the water and air directly adjacent to OMC's assembly plant, data processing operation and design and engineering facility on the Harbor-front property. EPA has itself acknowledged that its "construction, excavation and trenching" will pose substantial health and safety hazards to persons in the area (*Id.*).[5]

The construction work on OMC's property would also disrupt or eliminate OMC's access to and from its own facilities. Parts produced by OMC's Waukegan plants are essential to the continued operation of OMC's other facilities. The loss of the Waukegan manufacturing capability would therefore cause extensive hardship to OMC's other facilities (*Id.*).

The work EPA intended to perform under its February 13 warrant would also have excluded OMC from the use of its property and would have caused substantial disruptions to OMC's operations. EPA's drill rigs, trucks, waste haulers and other heavy equipment would disrupt traffic at OMC's facilities and could endanger its workers. EPA's

---

[5] Environmental Protection Agency, Conceptual Design, Document No. 13-5M28.0 W65328.00 (Sept. 14, 1984). Because the district court disposed of OMC's motion for preliminary relief without permitting discovery or hearing any testimony, *Outboard Marine Corporation v. Thomas* 610 F. Supp. 1234 (N.D. Ill. 1985), this EPA document was never introduced into evidence, and consequently, it is not in the record on appeal.

soil boring and earth removal activities would likely damage OMC's utility lines and water mains. EPA's borings on OMC's parking lot would preclude OMC from the use of that area and damage the foundations of the parking lot (*Id.*).

REASONS WHY THE WRIT SHOULD BE DENIED

Based upon the foregoing undisputed facts, the Seventh Circuit held that OMC was entitled to a preliminary injunction barring EPA from executing the February 13 warrant to begin the construction project on OMC's property. EPA claims that this Court should imply authority from the statute to carry out this project, because the agency needs such access in this and other cases. That claim is meritless. The decision below has not resulted in any hardship to EPA in this case or in others. Moreover, as the Seventh Circuit held, the statute's general grant of authority to the agency cannot support a broad power, in a non-emergency situation, to take over private property and completely disrupt ongoing industrial operations.

1. No Public Purpose Would Be Served By Permitting EPA Access To OMC's Property At This Time.

As the foregoing facts demonstrate, this case does not involve a routine Superfund landfill. The target of EPA's efforts is a large manufacturing complex which employs thousands of workers providing services and products for numerous other OMC facilities around the world. The vast

majority of OMC's Waukegan Harbor property is uncontaminated, and EPA does not contend otherwise. EPA states only that the most northern portion of OMC's property contains PCBs. The Harbor-front property is at the southern-most end of that property and is contiguous to no other parcel of OMC's property included in EPA's project.[6]

EPA has never made these facts clear to the magistrate and courts that have addressed this matter. Instead, it has consistently attempted to foster the assumption that the "OMC site" is a typical contaminated Superfund site. EPA does this by referring to OMC's property, together with Waukegan Harbor, generally as "the site." It continues this subtle but critical misrepresentation before this Court where it states, "EPA estimates that *the site* contains approximately 1.1 million pounds of PCBs" (Pet. Br. at 2, emphasis added). Elsewhere, Petitioners summarize the statements EPA made to the magistrate:

> In its warrant application, EPA stated that there had been a release of PCBs into the environment *at the Waukegan Harbor site*, and that an *on site* remedial response was necessary to prevent PCB migration.

(Pet. Br. at 5, emphasis added, citations omitted). In fact, EPA does not claim that OMC's property contains 1.1 million pounds of PCBs, nor has it ever claimed that there has been a release of PCBs from the Harbor-front property. EPA does not claim that "a remedial response is necessary to prevent PCB migration" from that property.

Petitioners' nomenclature deftly misrepresents the facts by falsely implying both that OMC's property is contaminated and that OMC owns Waukegan Harbor. By implying that the target of its remedy is a typical Super-

---

[6] *See* the maps appended hereto, App. A and B, *infra*.

fund site, EPA is able to avoid any consideration of the effects its occupation of OMC's property will have on OMC's operations and employees, or on other businesses in the area.[7]

The "problem," which ostensibly justifies EPA in taking over thirty acres of OMC's property, has existed for thirty years with, as Petitioners concede (App. C, *infra*), no identifiable adverse effects whatsoever. EPA has itself been studying the situation since 1976. As the lower court aptly stated, "There is no imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance [in the Waukegan Harbor area]. If there is an emergency, it is almost ten years old." *Outboard Marine Corporation v. Thomas*, 773 F.2d 883, 886 (7th Cir. 1986). The government's requests for, and full use of numerous extensions for the filing of its petition for rehearing below and its Petition to this Court further demonstrate the absence of any pressing need for access to OMC's property. In these circumstances, there can be no legitimate claim that the Seventh Circuit's decision is in any way contrary to the public welfare.[8]

---

[7] Adjacent to Waukegan Harbor are two marinas and several other businesses. They all utilize Waukegan Harbor on a daily basis. EPA's "remedy" could close down those businesses during the years of dredging and dewatering, and possibly beyond.

[8] Petitioners dispute the Seventh Circuit's statements that this matter does not involve an "imminent and substantial endangerment" (Pet. Br. at 10 n.16). EPA's Second Amended Complaint in the companion *OMC* case included an imminent and substantial endangerment claim under Section 106 of Superfund, 42 U.S.C. § 9606. In the resolution of the *OMC* case, EPA covenanted never to proceed against OMC in this matter under the imminent and substantial endangerment provisions. Petitioners certainly agree that there is no environmental emergency of any kind in the Waukegan Harbor area.

2. EPA Has Not Shown That The Lower Court's Decision Is Impeding Any Remedial Actions.

Petitioners contend that the Seventh Circuit's decision "is . . . likely to have a direct and immediate impact on EPA's ability to clean up the other 48 sites on EPA's National Priorities List within the Seventh Circuit" (Pet. Br. at 8). Petitioners also claim that the decision below "casts doubt" on their actions at hundreds of other sites across the country (*Id.*). Such vague and unsupported allegations of impending disaster do not justify this Court's intervention.

Even within the Seventh Circuit, EPA has specifically been granted access to property adjacent to a Superfund landfill for the purpose of carrying out long term remedial actions there.[9] EPA obtained access in that case after the Seventh Circuit's decision by proceeding under Section 106 of Superfund, 42 U.S.C. § 9606, and alleging the existence of an "imminent and substantial endangerment" in a situation that had been under study since 1975. That action completely belies EPA's claims that Section 106 provides it with no authority to obtain access to remedial sites (Pet. Br. at 11). In view of EPA's theory that "imminent and substantial endangerments" need be neither imminent nor substantial (Pet. Br. at 11 n.16), it is hard to understand how it can claim that "the Section 106 process can be cumbersome and lengthy" (Pet. Br. at 11).

The Seventh Circuit's ruling does not eliminate EPA's ability in proper cases, and through proper procedures, to obtain access to hazardous waste sites. CERCLA envisions an active role by the states in remedial actions

---

[9] *City of Bloomington, Indiana v. Westinghouse Electric Corporation*, Consolidated Cases IP 83-9-C, Order (S.D. Ind. May 2, 1986). A copy of the order granting EPA access to the site is appended hereto (App. D, *infra*).

paid for by the Superfund, 42 U.S.C. § 9604(e)(3), and thus state powers over private property are available to the EPA. This Court's consideration of the Seventh Circuit's decision is therefore not necessary to EPA's ability to obtain access to Superfund sites.

3. The Seventh Circuit Properly Interpreted The Superfund Statute.

Throughout the proceedings below, EPA refused to confront the legality of its entry onto OMC's property to implement a three and one-half year construction project to dredge Waukegan Harbor. In each of the proceedings prior to the present Petition, the government demanded that the court ignore the three and one-half year construction work and view its seventy day entry as if it were being carried out for its own purposes—not as the first step in the larger project. As the Seventh Circuit stated, "The EPA is alone in denying that surveying the site, placing survey monuments, locating utility lines, and taking weight-bearing subsurface test samples of soil are not, as a usual and practical matter, the first things to be done at a construction site." 773 F.2d at 888.

Moreover, contrary to the government's present position, Petitioners have regularly admitted, both tacitly and finally expressly, that the statute provides at best dubious grounds for entry to do construction work.[10] Now for the

---

[10] In the district court, Petitioners expressed puzzlement over the manner in which they would obtain access to perform the actual construction work:

> MR. HYNES: . . . But if you are getting into the question—and I don't think it should be gotten into here—but if it is for the whole remedy, going in, do the actual construction, all of that, a warrant is not appropriate.
>
> THE COURT: Okay. What would you be doing?

(Footnote continued on following page)

first time, Petitioners press the contention that the statute authorizes them to take over an ongoing industrial operation for the purpose of carrying out a remedy on adjacent property. The statute cannot be interpreted to authorize such extreme action. Petitioners acknowledge that the statute lacks express authority. They argue, however, that the statute must nevertheless be interpreted implicitly to authorize the kind of large scale condemnation and disruption envisioned by EPA's remedy.

Congress intended the Superfund legislation to fill in gaps in the then-existing legislative scheme which provided cleanup authority for spills in water[11] and for active waste disposal sites on land.[12] Superfund was passed primarily as a response to abandoned and inactive waste sites, which were not covered under prior law.[13] There

---

[10] *continued*

MR. HYNES: Basically we probably would be filing an affirmative action in the district court, you know, maybe something in terms of a declaratory judgment, some action like that. I am not exactly sure of the exact form it would take.

THE COURT: I see.

(Transcript of Proceedings, April 24, 1985, R.A. 23 at 3-4). As the Seventh Circuit found, when pressed on this point Petitioners expressly conceded that only new legislation would provide them with access authority to perform the remedy. 773 F.2d at 886, 888.

[11] Federal Water Pollution Control Act, § 311(c), 33 U.S.C. § 1321(c) (1982).

[12] Resource Conservation and Recovery Act of 1976, § 7003, 42 U.S.C. § 6973 (Supp. II 1984).

[13] Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. § 9601 *et seq.* (1982)). The legislative hearings are replete with statements by sponsors of the various bills about the problems presented by abandoned waste sites. *See, e.g. Hazardous and Toxic Waste Disposal Joint Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. 1 (1979) (statement of Senator Culver) ("we are searching for solu-

(Footnote continued on following page)

is no evidence that Congress intended the statute to authorize EPA arbitrarily to close down an ongoing business and to carry out a massive three and one-half year construction project there merely because doing so would advance its remedial work on adjacent property.

None of the sections of the statute EPA cites in its brief provides the broad authority it hopes to read into the Superfund statute. In the lower court and in their warrant, Petitioners cited Section 104(e), 42 U.S.C. § 9604(e), as "most germane" to its access demand. 773 F.2d at 889. They now have abandoned that position, and instead look to Sections 104(a) and (b) as the ostensible sources of their claimed access authority. 42 U.S.C. §§ 9604(a), (b). As the Seventh Circuit properly held, 773 F.2d at 888-89, those sections are merely general authorizations for EPA to carry out cleanups funded by the Superfund. They do not authorize the agency to take over private, uncontaminated property to implement a remedy in an adjacent harbor.

Petitioners' citations to cases in which the court upheld the government's right to carry out compliance inspections and investigations (Pet. Br. at 14-15) do not support their argument. As this Court has stated, condemnation powers will not be implied as a mere corollary of other general agency authority, "It is to be borne in mind that the taking of private property for public good is deemed to be against the common right and authority to do so must be clearly expressed." *Delaware L. & W. R.R. Co.*

---

[13] *continued*
tions to the problems of how to clean up old hazardous waste dump sites that now threaten our environment); *id.* at 4 (statement of Senator Stafford) (bill excludes releases from other than "orphaned sites or into water"); *id.* at 8 (statement of Mr. Jorling) ("The bill addresses releases to the environment of . . . hazardous substances, and hazardous wastes from spills from inactive and abandoned waste sites").

v. Morristown, 276 U.S. 182, 192 (1928). *Accord, United States v. 67.59 Acres of Land*, 415 F. Supp. 544, 547 (M.D. Pa. 1976) (eminent domain powers must be strictly construed); *United States v. 20.53 Acres of Land*, 263 F. Supp. 694, 696-97 (D. Kan. 1967) (eminent domain power is dormant "until enactment of legislation expressly authorizing its exercise"). *See also* Nichols on Eminent Domain 3d ed. § 3.2 (1983) (same). When Congress wishes to provide an agency with the authority Petitioners seek here, it does so through clear, express language.[14] The absence of such language shows that Congress did not intend CERCLA to supply EPA with authority to take over private property.[15]

---

[14] *See e.g.*, 33 U.S.C. § 591 (1982) (granting authority to Secretary of Army to "cause proceedings to be instituted . . . for the acquirement by condemnation of any land . . ." needed to maintain navigation of waters); 16 U.S.C. § 423k (1982) (authorizing Secretary of Interior to acquire property within certain boundaries); 10 U.S.C. § 2663 (1982) (authorizing military personnel to acquire property for certain purposes); 10 U.S.C. § 2664 (authorizing various agencies to condemn property needed for specified purposes).

[15] In its consideration of various bills, Congress had before it a proposal to authorize EPA to take over private property. In an appearance before the Senate Subcommittee on Environmental Pollution and Resource Protection, an official from the Iowa Department of Environmental Quality requested that Congress include in the Superfund legislation provisions to permit EPA to condemn property:

> I have three other general recommendations in regard to the law. I would like to see that EPA is authorized to take control of the dumpsite. Now that may in some cases mean actually having the authority to condemn property. Somehow or other on these sites, particularly if no responsible official can be found, someone is going to have to step in and take those over. It may be preferable that the local government or the State government do it. But in those cases where they do not have the capability, I think that EPA should be empowered to do that.

(Footnote continued on following page)

In the National Contingency Plan, 40 C.F.R. Pt. 300, EPA has spelled out comprehensive "procedures . . . to be employed in identifying, removing or remedying releases of hazardous substances." 42 U.S.C. § 9605. Nowhere in that regulation has EPA established procedures for obtaining access to private property through warrants, through "orders in aid of access" or through any other means. In 1985, after the lower court's decision was issued in this case, EPA amended the National Contingency Plan and continued to omit any access procedures. 50 Fed. Reg. 47,912, 47,950 (Nov. 20, 1985). The obvious conclusion is that the agency does not as a practical matter believe that the statute provides it with access authority.

The ruling of the Seventh Circuit accurately interpreted the Superfund statute as it presently exists. It is up to Congress to vest the EPA with additional authority if it so chooses.

---

[15] *continued*
Hazardous and Toxic Waste Disposal Field Hearing: Joint Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environmental and Public Works, 96th Cong., 1st Sess. 25 (1979) (Remarks of Mr. Crane). Despite its awareness of the possibility of conferring power on EPA to take over private property, Congress chose to ignore Mr. Crane's recommendation.

CONCLUSION

For all the foregoing reasons, Respondent Outboard Marine Corporation respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

RICHARD J. PHELAN
(Counsel of Record)

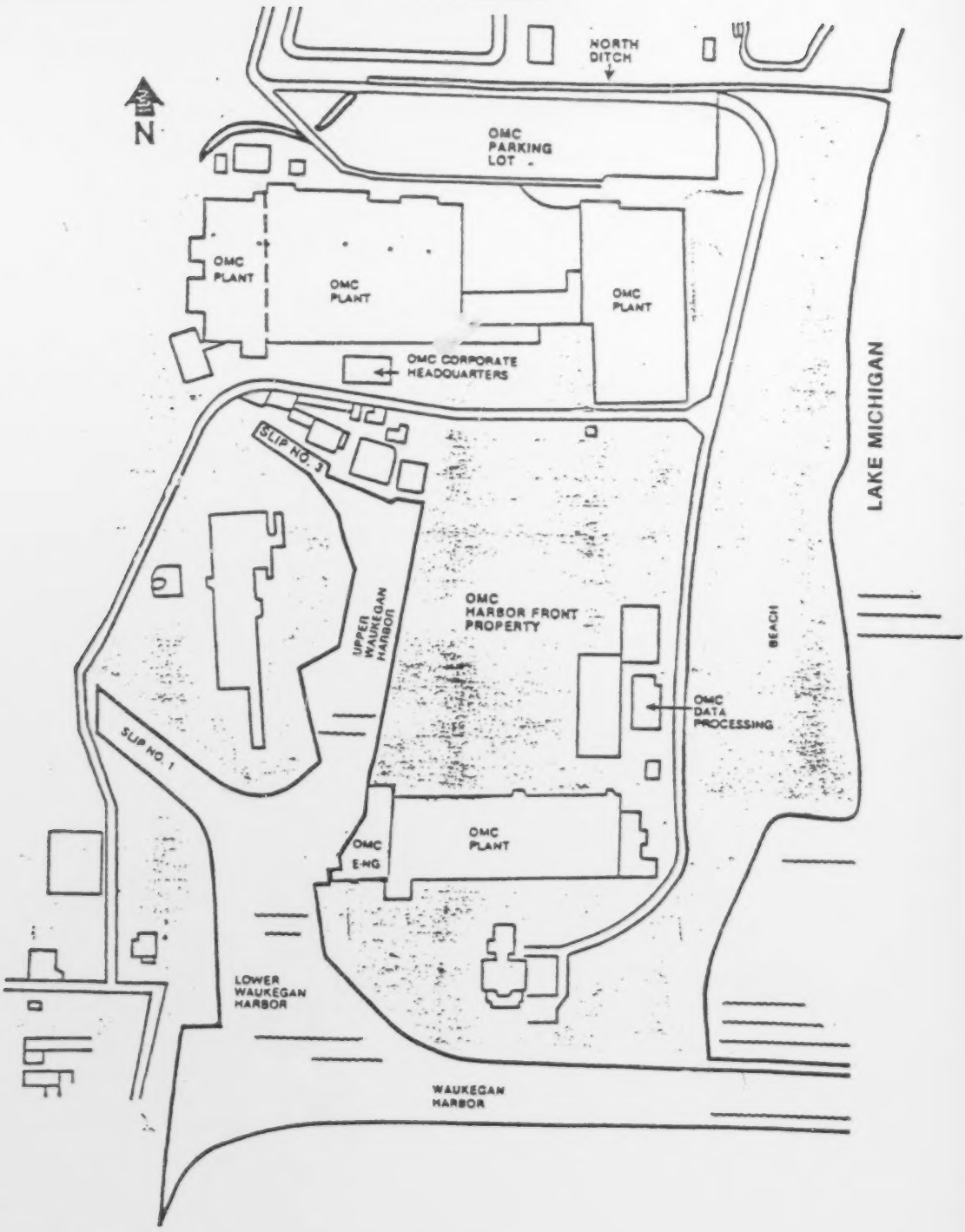
Of Counsel:

PHELAN, POPE & JOHN, LTD.
180 North Wacker Drive
Chicago, Illinois 60606
(312) 621-0700

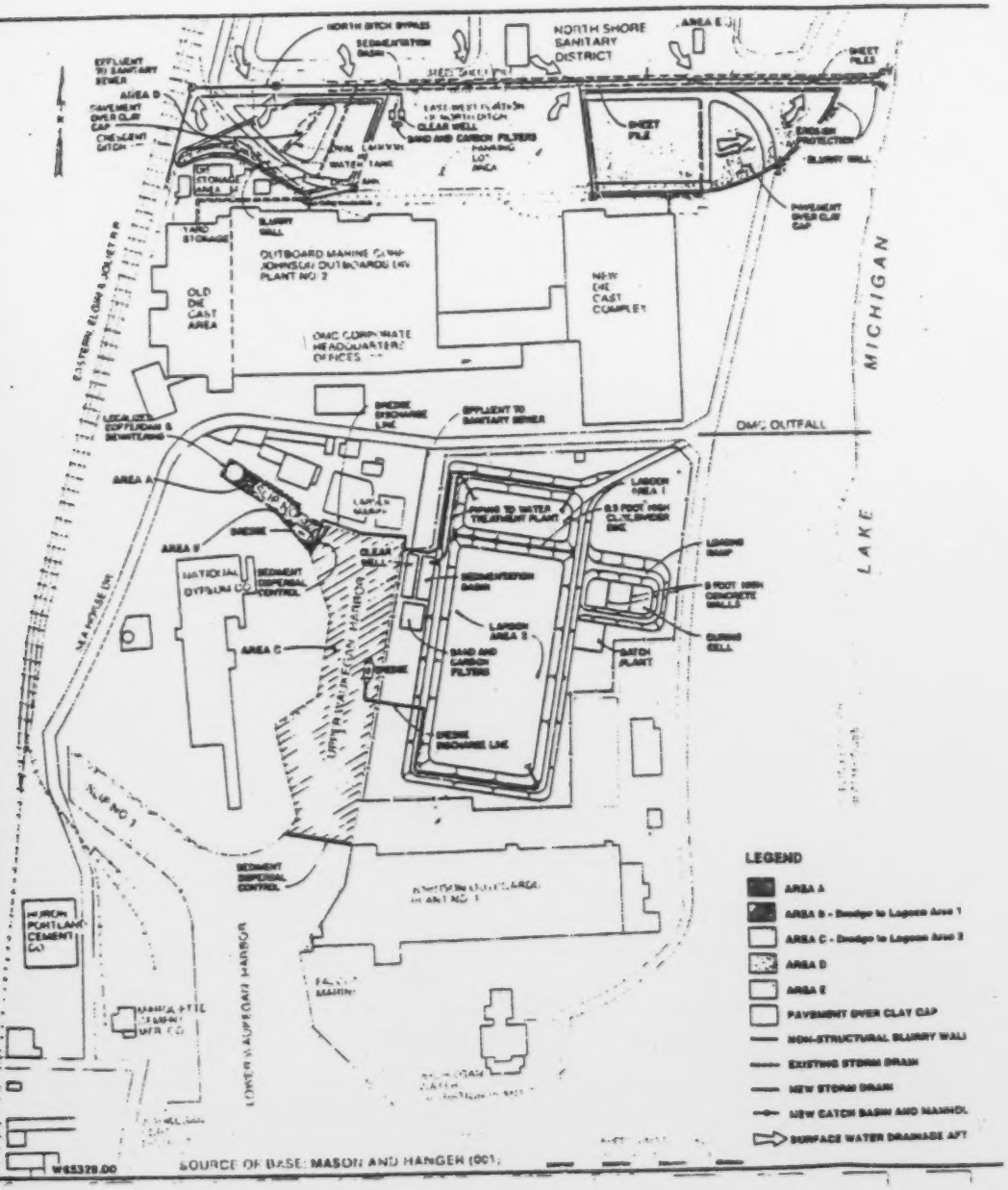
MARTIN, CRAIG, CHESTER
& SONNENSCHEIN
115 South LaSalle Street
Chicago, Illinois 60603
(312) 368-9700

APPENDIX

APPENDIX A


NORTH DITCH
N
OMC PARKING LOT
OMC PLANT
OMC PLANT
OMC PLANT
OMC CORPORATE HEADQUARTERS
SLIP NO. 3
LAKE MICHIGAN
UPPER WAUKEGAN HARBOR
OMC HARBOR FRONT PROPERTY
BEACH
OMC DATA PROCESSING
SLIP NO. 1
OMC ENG
OMC PLANT
LOWER WAUKEGAN HARBOR
WAUKEGAN HARBOR

APPENDIX B


NORTH SHORE SANITARY DISTRICT
AREA E
SHEET PILE
AREA D
SLURRY WALL
OUTBOARD MARINE CORP. JOHNSON OUTBOARDS DIV. PLANT NO. 2
OMC CORPORATE HEADQUARTERS OFFICES
OLD DIE CAST AREA
NEW DIE CAST COMPLEX
PAVEMENT OVER CLAY CAP
EFFLUENT TO SANITARY SEWER
OMC OUTFALL
LAKE MICHIGAN
AREA A
AREA B
AREA C
NATIONAL GYPSUM CO.
SEDIMENT DISPOSAL CONTROL
CLEAR WELL
SEDIMENTATION BASIN
SAND AND CARBON FILTERS
BATCH PLANT
LOADING RAMP
CURING CELL
LOWER AUGLAIZE HARBOR
MAUMEE BAY
HURON PORTLAND CEMENT CO.
LEGEND
AREA A
AREA B - Dredge to Lagoon Area 1
AREA C - Dredge to Lagoon Area 2
AREA D
AREA E
PAVEMENT OVER CLAY CAP
NON-STRUCTURAL SLURRY WALL
EXISTING STORM DRAIN
NEW STORM DRAIN
NEW CATCH BASIN AND MANHOLE
SURFACE WATER DRAINAGE ART
W65378.00
SOURCE OF BASE: MASON AND HANGER (001)

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

OUTBOARD MARINE CORPORATION,

Defendant, Third-Party Plaintiff, and Cross-Claim Defendant,

and

MONSANTO COMPANY,

Defendant, Third-Party Defendant, and Cross-Claim Plaintiff.

No. 78 C 1004—Judge Susan Getzendanner

PLAINTIFF'S RESPONSE TO DEFENDANT MONSANTO COMPANY'S FIRST AMENDMENT TO ITS SECOND SET REQUESTS FOR ADMISSION TO PLAINTIFF UNITED STATES

In accordance with Rule 36 of the Federal Rules of Civil Procedure, plaintiff United States of America response [sic] to defendant Monsanto Company requests to admit as follows:

REQUEST TO ADMIT

1. Region V of the United States Environmental Protection Agency ("USEPA Region V") is headquartered in Chicago, Illinois and covers the States bordering on Lake Michigan.
RESPONSE: Plaintiff admits Request No. 1.

2. At this time USEPA Region V knows of no person who has suffered any immological [sic] disorder caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 2.

3. At this time USEPA Region V knows of no person who has suffered any cancer caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 3.

4. At this time USEPA Region V knows of no human birth defects caused by PCB in any infant born to any person who has consumed fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 4.

5. At this time USEPA Region V knows of no person who has suffered any sickness caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 5.

6. At this time USEPA Region V knows of no person who has suffered any chloracne, dermatitis or skin disorder caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 6.

7. At this time USEPA Region V knows of no person who has suffered any neurological disorder caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 7.

8. At this time USEPA Region V knows of no person who has suffered any fatigue caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 8.

9. At this time USEPA Region V knows of no person who has suffered any reduction or impairment in his vital lung capacity caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 9.

10. At this time USEPA Region V knows of no person who has suffered any hypertension caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 10.

11. At this time USEPA Region V knows of no instance of mutagenicity in any human being caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 11.

12. At this time USEPA Region V knows of no instance of fetotoxicity in any human being caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 12.

13. At this time USEPA Region V knows of no instance of teratogenicity in any human being caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 13.

14. At this time USEPA Region V knows of no instance of abnormal blood pressure in any person caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 14.

15. At this time USEPA Region V knows of no person who has suffered any heart disease or blood disease caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 15.

16. At this time USEPA Region V knows of no person who has suffered any reduced or abnormal physical growth caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 16.

17. At this time USEPA Region V knows of no person who has suffered any mental or behavioral disorder caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 17.

* * * * *

31. The air in and near Waukegan Harbor, the North Ditch, and the property of Outboard Marine Corporation poses no significant human health problem attributable to the PCBs there.
RESPONSE: Plaintiff admits Request No. 31.

32. The drinking water in Waukegan, Illinois poses no significant human health problem attributable to PCBs in Waukegan Harbor, in the North Ditch, or on the property of OMC.

RESPONSE: Plaintiff admits Request No. 32.

Respectfully submitted,

DAN K. WEBB
United States Attorney

BY: /s/ JAMES P. WHITE
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-8788

JPW:ejd
09/15/82

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THE CITY OF BLOOMINGTON, INDIANA, THE UTILITIES SERVICE BOARD OF BLOOMINGTON, INDIANA and MONROE COUNTY, INDIANA,
Plaintiffs,

v.

WESTINGHOUSE ELECTRIC CORPORATION and MONSANTO COMPANY,
Defendants.

and

UNITED STATES OF AMERICA,
Plaintiff,

and

THE STATE OF INDIANA and THE ENVIRONMENTAL MANAGEMENT BOARD OF THE STATE OF INDIANA,
Intervening Plaintiffs,

v.

WESTINGHOUSE ELECTRIC CORPORATION,
Defendant and Third Party Plaintiff,

v.

MONSANTO COMPANY,
Third Party Defendant.

Consolidated Cases — IP 83-9-C — Judge S. Hugh Dillin

ORDER FOR ACCESS TO CONARDS' PROPERTY

The Court having considered the Motion of the United States for Access to the Property of Dale and Connie Conard, the other pleadings of the parties on this issue, and the response thereto, it is hereby,

ORDERED:

1. Westinghouse Electric Corporation, its employees, agents and contractors, shall be permitted full and complete access to the real estate owned by Dale and Connie Conard, as specifically described in Exhibit "A" attached hereto ("said real estate"), as may be necessary to perform, complete, and maintain such remedial, sampling, and maintenance measures as are required under the Consent Decree to be performed at Conard's Branch and Richland Creek. Employees, agents, contractors, and duly authorized representatives of the United States, the State of Indiana, the City of Bloomington, and Monroe County shall also be permitted full and complete access to said real estate for the purposes of inspecting, monitoring, sampling and observing the performance, completion, and maintenance of such measures by Westinghouse Electric Corporation, for the other purposes in the Consent Decree and as necessary to fulfill their responsibilities under the Consent Decree.

2. Dale and Connie Conard shall take all steps necessary to permit and allow performance of the measures specified in the Consent Decree on their property, including, but not limited to cooperating in signing, if necessary, any necessary applications for governmental authorizations or permits, and providing access to the parties to the Consent Decree for the purposes specified in the Consent Decree, including the installation and maintenance of signs and fences, the excavation and removal of solid and hazardous substances, wastes and soils, the regrading, refilling

and capping of excavated areas, the installation, maintenance, and sampling of groundwater monitoring wells, the removal of stream sediments, and general site monitoring.

3. Dale and Connie Conard shall not interfere in any way with the performance, completion, and maintenance of said remedial, monitoring, and maintenance measures as are required by the Consent Decree on said real estate, nor alter, remove, or otherwise disturb the same.

4. This Order shall be binding upon Dale and Connie Conard, and upon their heirs, successors and assigns, and upon said real estate, and shall be filed in the office of the Recorder of Monroe County, Indiana and with the Clerk of the Monroe Circuit Court, Monroe County, Indiana.

/s/ S. HUGH DILLIN
UNITED STATES DISTRICT JUDGE

Date: 5/2/86

[Exhibit A omitted in printing.]